

Janet Napolitano
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Marcia J. Busching
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State of Arizona
Citizens Clean Elections Commission

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PROBABLE CAUSE RECOMMENDATION

To: Commissioners

From: L. Gene Lemon, External Investigative Consultant

Date: June 9, 2005

Subject: MUR # 04-0022 – Colette Rosati

This shall reaffirm that I intend to proceed with my May 6, 2005 probable cause recommendation pursuant to A.A.C. R2-20-214(D).

Colette Rosati responded to the May 6, 2005 brief by letter dated May 12, 2005 (copy attached). I find no merit in the responses and hereby give notice that I will proceed with my recommendation that the Commission find probable cause to believe that violations of the Citizens Clean Elections Act and Commission rules has occurred.

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May 6, 2005

Ms. Colette Rosati
6040 East Jenan Drive
Scottsdale, AZ 85254

Re: CCEC File MUR No. 04-0022 - **Revised**

Dear Ms. Rosati:

I am writing in reference to the Citizens Clean Elections Commission's ("Commission") October 5, 2004 Reason to Believe Finding and subsequent investigation conducted pursuant to R2-20-209. The Commission found reason to believe that you violated A.R.S. § 16-948(C), A.A.C. R2-20-701 and 704(B).

Pursuant to A.A.C. R2-20-214, this letter shall serve as the brief setting forth my position on the factual and legal issues in the case. In summary, my recommendations are that the Commission should find: (1) that you committed violations of the Citizens Clean Elections Act ("Act") and/or Commission rules with respect to the voter list purchased by Constantin Querard ("Querard") from the Republican party on your behalf; (2) probable cause to believe that you violated the Act and/or Commission rules with respect to the early voter data you purchased from Querard; (3) no probable cause to believe that you committed any violation with respect to the use of petty cash; and (4) probable cause to believe that you have violated A.R.S. § 16-948(C), which requires payment from a participating candidate's campaign account directly to the person providing goods or services to the campaign and identification of the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made on campaign finance reports. As the civil penalty for these violations, I recommend that the Commission fix the amount at \$ 20,000.00 pursuant to A.R.S. § 16-942(A) & (B).

My findings and conclusions are based upon my review of the following: the responses of the Rosati 2004 Campaign; the auditors' investigative report and the Respondent's response thereto; deposition testimony given by the Respondent; deposition testimony given by Constantin Querard; the Commission's Reason to Believe Finding; and other relevant information. Based upon my review of the audit and the Respondent's response to the audit, I do not find it necessary to issue a final audit report. My findings are as follows:

I. Voter List and Early Voter Data

The allegation in Ann Flora's complaint, filed September 10, 2004 with the Commission, regarding the voter list is that the Respondent paid \$200.00 to Querard as reimbursement for a voter list that he purchased from the Republican party and that Querard then used the voter list for a commercial purpose; i.e. he created an early ballot request form that he sent to the registered voters on the voter list, compiled data from the early ballot request forms that were returned to him and then sold that data to the Respondent. This allegation implicates two separate issues. I address each of those issues below.

A. Voter List

Under the Act, participating candidates may spend clean elections funds only for direct campaign purposes. *See R2-20-702(A)*. ("A participating candidate shall use funds in the candidate's current campaign account to pay for goods and services for direct campaign purposes only.") Furthermore, all participating candidates shall have the burden of proving that expenditures made by the candidate were for direct campaign purposes. *R2-20-703(A)(2)*.¹

On December 21, 2003, Querard purchased a voter list from the Arizona Republican Party for \$200.00 on behalf of the Respondent. The Respondent reimbursed Querard for the \$200.00 payment on December 23, 2003. Querard then used that voter list to send out his early ballot request form, from which he gleaned early voter data that he then sold to the Respondent for \$2,675.00. During her deposition the Respondent testified variously that she used the voter list to create walking lists for her 2004 campaign, that she obtained the voter list for her constituent fund Christmas cards mailing but paid for it with her campaign account, and that she left it with Querard and is not sure how it was used. In light of these insufficient facts, I am unable to recommend to the Commission that it make a probable cause finding that a violation occurred.

B. Early Voter Data

In July 2004, the Rosati 2004 campaign purchased early voter data from Constantin Querard for \$2,675.00. Querard obtained the data from the early ballot request forms he sent out, using the voter list purchased from the Arizona Republican Party.

By purchasing the early voter data for only \$2,675.00, the Respondent accepted an in-kind contribution from Querard because what she spent to purchase the early voter data is less than what it would have cost her to produce and mail her own early ballot request form.

¹ It is also worth noting that in the application for certification as a participating candidate, the candidate certifies under oath that the candidate agrees to use all Clean Elections funding for direct campaign purposes only (*R2-20-104(C)(1)*), will comply with all requirements of the Act and Commission rules (*R2-20-104(C)(3)*) and that the candidate has the burden of proving that expenditures made by or on behalf of the candidate are for direct campaign purposes. *R2-20-104(C)(5)*.

In her deposition, the Respondent was asked about the cost of an early ballot request form. Her testimony is as follows:

- Q: Okay. Did you ever ask Constantin Querard to create an early ballot request form for you?
- A: I don't recall.
- Q: Did you ever ask anyone to create an early ballot request form for you?
- A: I don't recall. It was my understanding, my campaign, that they're expensive to produce, and so I – you know, we didn't have one made just for me.
- Q: And when you say "they're expensive to produce," like, how much would it cost to produce one?
- A: Well, I don't know, but it would be doing a mailing – equal to doing another mailing that you would use in a campaign.

Respondent paid various amounts for her campaign literature: \$3,720.00 for 10,000 taxpayer pieces; \$3,850.00 for 9,000 education pieces; \$3,920.00 for 11,000 immigration pieces; \$4,230.00 for 11,000 "time to choose" pieces; \$2,600 for some attack pieces (quantity unknown); and \$4,290 for 11,000 contrast pieces. Most of these cost more than the \$2,675.00 she paid Querard for the early voter data he obtained as a result of his early ballot request forms. Additionally, Respondent's mailings would have gone to fewer voters on the "cleaned up" list obtained as a result of Querard's early ballot request form mailing.

Thus, Respondent admitted that she paid less for the data than if she had sent out her own early ballot request forms. In the Maricopa County Republican Party et al. v. Constantin Querard, et al.² case, Querard testified that he "charged what was needed to recoup [his] cost of collecting the data."³ During his deposition, Querard was reminded of his testimony in the Republican Party case and asked what he meant by that answer. At that point, his attorney objected on the grounds of relevance to the case and "self-incrimination," and Querard was instructed by his attorney not to answer the question. Querard was then asked if it only cost him \$2,675.00 to produce the early ballot request form for District 8 or whether he had made a profit by selling the early voter data for \$2,675.00 and he again refused to answer the questions.⁴

While the record does not establish the exact cost of the early ballot request form mailing information the campaign purchased, the Respondent's testimony that buying the list was a great saving over spending the money to make one herself is believable. There were 54,507 active Republicans registered in District 8 at the time the voter list was purchased from the Republican Party in December, 2003; an inexpensive piece mailed only to households (not to all those registered) would cost over \$5,000.00 and above the average cost of the mailings Respondent made using her "efficient" list.

² On April 4, 2005, the Superior Court, pursuant to a stipulation between Plaintiff Maricopa County Republican Party and Querard, entered a Judgment dismissing Plaintiff Maricopa County Republican Party from the action and dismissing all claims brought by Plaintiff Maricopa County Republican Party against Querard with prejudice.

³ Page 102, lines 4-5.

⁴ See, *Berenter v. Gallinger*, 173 Ariz. 75, 82, 839 P.2d 1120, 1128 (App. 1992) (The Fifth Amendment privilege against self-incrimination in criminal proceedings is not applicable to civil actions and an administrative agency may draw an adverse inference from an assertion of the privilege.)

Based on the above facts, I recommend that the Commission find probable cause to believe that a violation of the Act and/or Commission rules has occurred; namely, that the Respondent violated A.R.S. § 16-941(A)(1), which prohibits participating candidates from accepting private contributions.⁵

II. Petty Cash

I find the Respondent's response convincing that no significant violation of the Act and/or Commission rules has occurred, and I adopt the responses as my finding on this allegation. Therefore, I recommend that the Commission find no probable cause to believe that a violation of the Act and/or Commission rules has occurred with respect to this issue.

III. Payments Directly to Person Providing Goods and Services

Participating candidates, or persons authorized by them, are required to pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of the Campaign Contributions and Expenditures chapter of the Arizona Revised Statutes, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made. A.R.S. § 16-948(C).

For their investigative report, the Commission's auditors reviewed all campaign expenditures of the Rosati 2004 campaign made during the period from November 1, 2003 through October 13, 2004. During that period, the campaign made total expenditures of \$45,372.31, of which \$29,807.64 were made to campaign consultants Querard and Bluepoint Consulting. The expenditures were identified variously as "initial campaign pieces," "campaign literature," "automated calls," "contrast piece, printing, mailing," and the like, but the vendors (designers, printers, mailers) of those goods and services were not identified, nor were the quantities or costs.

In defense of the campaign, the Respondent gave several responses. For example, the Respondent stated that Rosati 2004 "followed the exact same reporting methodology it used during its 2002 campaign," that all candidates believe the reporting requirement is "simply to indicate the total amount paid to a consultant for advertising on an all-inclusive basis," and that the Commission should issue more rules and policy statements necessary to adequately inform candidates of the reporting requirements. I do not find any of these arguments persuasive. Specifically with respect to the third argument, I would respond by saying that A.R.S. § 16-948(C) is straight-forward. Moreover, in addition to providing candidate training, which

⁵ A.R.S. 16-947(B)(3) requires a candidate who wishes to be certified as a participating candidate to file an application with the Secretary of State before the end of the qualifying period. Among other things, the application contains the candidate's signature, under oath, certifying that "[t]he candidate will comply with the requirements of section 16-941, subsection A during the remainder of the election cycle and, specifically, will not accept private contributions." In the application for certification as a participating candidate, the candidate certifies under oath that she will comply with all requirements of the Act and Commission rules. R2-20-104(C)(3). If certified as a participating candidate, the candidate shall: only accept early contributions during the exploratory period and qualifying periods in accordance with the Act, R2-20-104(D)(1); and not accept any private contributions, other than early and qualifying contributions. R2-20-104(D)(2).

includes discussion of the requirements of A.R.S. § 16-948(C), the Commission sent a letter of instruction on the very subject to each participating candidate in July 2004 (copy attached).

To put this in context, it is important to note that this is not the first time this issue has come before the Commission. In CCEC MUR #04-0025, In the Matter of Mark Manoil and Nina Trasoff, the Commission found reason to believe that the participating candidates' reports of payments to their campaign consultants for "literature," without identifying on the campaign finance report the person who provided the goods or services, postage used for the mailer, printer for printing, and graphic designer who created the mailer, violated the Act and issued an Order Requiring Compliance. Within the specified time for compliance, the candidates/respondents amended their campaign finance reports to disclose the required information. Thereafter, the Commission acknowledged their compliance and dismissed the matter.

The Commission also made a reason to believe finding in CCEC MUR #04-0028/37, In the Matter of Pamela Gorman, based upon similar allegations. In the Gorman matter, the Commission found reason to believe that the candidate had violated A.R.S. § 16-948(C) because she had failed to pay the vendor directly for goods and services. After issuing an Order Requiring Compliance, the candidate amended her campaign finance reports to disclose the required information. In this case as well, the Commission acknowledged Gorman's compliance and dismissed the matter.

In CCEC MUR #04-0048, In the Matter of Royce Flora, the complaint alleged violations of A.R.S. § 16-948(C). The Commission accepted the staff's recommendation of no reason to believe findings in part because, once the candidate received the complaint, the candidate amended their campaign finance reports to disclose the required information.

One of the purposes of the Act was to "diminish[] the influence of special-interest money..." A.R.S. § 16-940, and the Act specifically prohibits the acceptance of private contributions⁶ by participating candidates. Lumping expenditures by merely reporting the transfer of funds from the campaign account to a campaign consultant hides the material facts the law requires to be disclosed and, possibly, illegal contributions. In other words, the consultant's billing statement or invoice to the candidate may show that a particular good or service cost a certain amount; however, without the reporting of the underlying costs (i.e. for printing, mailing, etc.), it is impossible for the Commission to determine whether the candidate has accepted any illegal in-kind contributions. For example, if the underlying invoices (for printing, mailing, etc.) show that it actually cost more to create a certain piece of campaign literature than what was actually charged to the candidate by a consultant or "message vendor", then somebody or something is "subsidizing" that particular campaign by making in-kind contributions. Without the reporting requirements imposed by the Commission's rules, it would be difficult, if not impossible, to discover those situations in which the contribution limits have been violated.

The Respondent failed to comply with A.R.S. § 16-948(C); indeed, unlike the other candidates discussed above, the Respondent did not even attempt to amend her campaign finance reports to comply with the Act.

⁶ Participating candidates may accept a limited number of early and \$5 qualifying contributions. However, they may do so only during the exploratory and qualifying periods. A.R.S. § 16-945. Once those periods end, the participating candidate may accept no private contributions.

Moreover, even if the Respondent wanted to amend her campaign finance reports to comply with the Act, she is unable to do so. During her deposition, the Respondent was questioned about the various pieces of campaign literature. Although she thought that they were designed by either Querard or Chris Baker, she did not know that for sure. Furthermore, she was unable to identify who printed and mailed them or how much any of those services cost. When asked how she knew that what she was getting from either of the consultants was worth the money she paid to them, her response was that she didn't, that she "just had to trust" them. Furthermore, the Commission subpoenaed records from the Respondent and those records do not provide the missing information.

Based upon the facts detailed above, I recommend that the Commission find probable cause to believe that a violation of the Act and/or Commission rules has occurred; namely that the Respondent violated A.R.S. § 16-948(C).

IV. Civil Penalty

I recommend that the Commission make a finding that there is probable cause to believe that Respondent violated: (1) A.R.S. § 16-941(A)(1), which prohibits participating candidates from accepting private contributions; and (2) A.R.S. § 16-948(C), which requires participating candidates, or persons authorized by them, to pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and to identify, on a report filed pursuant to article 1 of this chapter, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made; and that the Commission issue an Order assessing a civil penalty in accordance with A.R.S. § 16-942 (A) and (B).

Pursuant to A.R.S. § 16-942(A), the civil penalty for a violation of any contribution limit in section 16-941 by or on behalf of a participating candidate shall be ten times the amount by which the expenditures or contributions exceed the applicable limit. For the violation of A.R.S. § 16-941(A)(1), I recommend a civil penalty in the amount of \$10,000.00, which is ten times one thousand dollars, not nearly as large as the savings respondent claims were realized but puts the civil penalty at the limit generally used by the Commission as discussed below.

Pursuant to A.R.S. § 16-942(B), the civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by Chapter 6 of Title 16 shall be \$110.00 per day for candidates for the legislature. The first expenditure not properly and adequately reported pursuant to A.R.S. § 16-948(C) occurred on February 14, 2004 made to Blueprint Consulting for "initial campaign pieces." That expenditure was due to be reported June 30, 2004. It is not constructive to continue counting days, but I note that the violation has persisted for over 300 days and a civil penalty of over \$30,000.00 is specified by the Act.

R2-20-222 of the Commission's rules generally limits penalties for violations of the Act to \$10,000.00 and I find it appropriate to recommend use of that general rule for each of the violations just discussed in this matter. Accordingly, I will recommend a civil penalty of \$20,000.00, for which the candidate shall be liable and the candidate's campaign shall be jointly and severally responsible for the \$ 10,000.00 civil penalty imposed pursuant to A.R.S. Sec. 16-942(B).

V. Briefing Procedures

Within five (5) days from receipt of this letter from the External Investigative Consultant, the Respondent may file a brief with the Commission setting forth the Respondent's position on the factual and legal issues of the case pursuant to A.A.C. R2-20-214(C). After reviewing the Respondent's brief, the External Investigative Consultant shall promptly advise the Commission in writing whether he intends to proceed with the recommendation or to withdraw the recommendation from Commission consideration. R2-20-214(D).

Sincerely,

L. Gene Lemon
External Investigative Consultant
Citizens Clean Elections Commission

cc: Commissioners